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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-110

STATE OF WISCONSIN, *Petitioner*

v.

JONAS YODER, ET AL., *Respondents*

On Certiorari to the Supreme Court of the State of Wisconsin

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The National Jewish Commission On Law and Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox

Jewish Community on matters of public concern. The Commission is deeply committed to the preservation of constitutional right for all Americans, and in particular to the principles of the First and Fourteenth Amendments in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty. Essential to the protection and preservation of these rights is the effective implementation of the Free Exercise Clause of the First Amendment. That Clause—unfortunately eclipsed by this Court's recent concern with the same Amendment's Establishment Clause—prohibits unwarranted and unnecessary restraints upon religious practice and belief. In our view, it was designed by the Founders of our Nation to preserve and foster the pluralistic quality of American society, an aspect of its heritage which goes back to the settlement of this continent almost four centuries ago. We believe that it is important, at this time in the nation's history, that this Court reaffirm that principle and thereby stem an alarming and ever-increasing tide of private and governmental hostility to, and discrimination against, religious nonconformists. The promise of the Bill of Rights and the proud origins of the United States permit no less.

QUESTION PRESENTED

Whether the Free Exercise Clause of the First Amendment permits the punishment of Amish parents who refuse, on religious grounds, to send their children to high school as directed by a Wisconsin statute which requires "any person having under his control a child who is between the ages of 7 and 16 * * * [to] cause such child to attend school regularly * * *."

ARGUMENT

THE FREE EXERCISE CLAUSE BARS ENFORCEMENT OF WISCONSIN'S COMPULSORY EDUCATION LAW AGAINST PARENTS WHO REFUSE, FOR REASONS OF CONSCIENCE, TO SEND THEIR CHILDREN TO HIGHSCHOOL BUT PROVIDE THEM WITH AN INFORMAL "LEARNING BY DOING" EDUCATION WITHIN THEIR RELIGIOUS COMMUNITY

The constitutional issue presented by this case—as it emerges from the record made in the trial court—is whether the State of Wisconsin may compel Amish parents to conform to the State's view of a proper or desirable education for children beyond the eighth grade. We believe that the Free Exercise Clause of the First Amendment—as it has been applied in this Court's decisions—forbids Wisconsin to coerce conformity of this kind over sincerely held religious convictions, and that the constitutional mandate requires the State to accommodate its generally applicable educational requirements to the legitimate and nonharmful needs of the Amish religious community.

We emphasize, at the outset, what this case does *not* involve. It is not a case in which parents are claiming the right to keep their highschool-age children from school in order to put them to work in commercial or fund-raising ventures or to free them for frivolous or nonproductive activity. Nor is it a case in which parents have been prompted by purely social, philosophical or economic differences with a public school administration to remove their children from the system. This case concerns parents whose religious convictions have led them to conclude that acceptance of the form of school prescribed by the State officials would "endanger" their "salvation * * * [in] an eternal world which is believed to be ahead" (App. 118). And instead of sending their children to the

public highschool—which would teach them values and provide "temptations" viewed as harmful and corrupt by the Amish (App. 117, 121)—or to a private school in a format acceptable by the State authorities, these parents believe in "learning by example" (App. 118) and in "learning by doing" (App. 125). Hence the constitutional issue is whether their religious convictions may be overridden by the State's judgment that the only proper format for a highschool education is the traditional one—*i.e.*, in a school building, with the use of traditional learning tools such as books and blackboards, and with a prescribed curriculum of academic subjects.

A. Wisconsin Must Prove a "Compelling State Interest" in Forcing Amish Parents To Forgo the Kind of Education of Highschool-Age Children Which Their Faith Commands.

This case involves, as did *West Va. Board of Education* v. *Barnette*, 319 U.S. 624 (1943), the assertion of a right by the defendants which "does not bring them into collision with rights asserted by any other individual." 319 U.S. at 630. Here, as was true in *Barnette*, "the sole conflict is between authority and the rights of the individual." *Ibid.* And, as Justices Black and Douglas (who in *Barnette* reversed the positions they had taken three years earlier in *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940)) observed in their *Barnette* concurrence, the controlling question must be whether the State's laws meet the standard of the Religion Clauses of the First Amendment—*i.e.*, whether they "permit the widest toleration of conflicting viewpoints consistent with a society of free men." 319 U.S. at 644.

The Court's majority opinion in *Barnette* noted that it was a "fixed star in our constitutional con-

stellation * * * that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642. And the concurrence of Justices Black and Douglas defined the governing criteria in deciding whether State laws inhibiting "the substance of religious tenets and practices" was permissible as whether they are "imperatively necessary to protect society as a whole from grave and pressingly imminent dangers * * *." 319 U.S. at 643-644.

This was essentially the same standard as this Court applied in *Sherbert* v. *Verner,* 374 U.S. 398 (1963). Recognizing the teaching of some prior decisions that "governmental regulation of certain overt acts prompted by religious beliefs or principles" may be permissible, the Court defined the borders of that area in the following terms: "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." 374 U.S. at 403.

Here, as in *Sherbert,* the conduct at issue presents no such danger. If any harm is caused by the absence of Amish children from public or private highschools in Wisconsin, it is not to "public safety, peace or order." Indeed, the only claim made by the State is that the children themselves are harmed—a claim which we treat more fully below (pp. 10-15, *infra*). Hence the sole available constitutional justification for requiring Amish parents to violate their religious convictions or be subject to criminal penalties would be the existence of a "compelling state interest" within the meaning of *Sherbert* and *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

B. Standardization and Homogeneity of Education Is Not a Permissible—Much Less Compelling—State Interest.

In early decisions not even invoking the Free Exercise Clause of the First Amendment, this Court unequivocally rejected claims of State authorities that they could compel institutions of learning within their borders to conform to models which the State authorities deemed desirable. In *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), and *Bartels* v. *Iowa,* 262 U.S. 404 (1923), the Court declared unconstitutional local statutes designed to prohibit the teaching of modern foreign languages in public or private schools. Recognizing the legitimate "desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civil matters" (262 U.S. at 402), the Court held that the law violated the fundamental Fourteenth Amendment rights of the parents of schoolchildren and that it was "arbitrary and without reasonable relation to any end within the competency of the State." *Id.* at 403.

In *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), again without reliance upon the rights of free exercise of religion, the Court held unconstitutional an attempt by the State "to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535. Recognizing in *Farrington* v. *Tokushige,* 273 U.S. 284 (1927), that what purported to be a statute regulating foreign language schools in Hawaii actually gave "affirmative direction concerning the intimate and essential details of such schools, intrust[ed] their control to public officers, and den[ied] both owners and patrons reasonable choice and discretion

in respect of teachers, curriculum and textbooks" (273 U.S. at 298), this Court affirmed an injunction against the law's enforcement on the ground that "it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful." *Ibid.*

The issues in the 1920's may have been the teaching of foreign languages and the right of private schools to exist, and those particular legal doubts may then have been laid to rest, but the underlying philosophical question is the same now as it was then—and as it was in the 1940's when the flag-salute cases came before this Court: May State officials use their authority—indeed, their obligation—to educate children as a basis for compelling uniformity and adherence to what they believe to be right notwithstanding the conscientious beliefs of parents to the contrary?[1] We submit that this Court's answer today must be what it was in the 1920's and, after some uncertainty, in the 1940's. For today—more than ever before—it is imperative that this Nation not lose sight of its greatest accomplishment—its proven ability to accommodate the diverse strains of our pluralistic society.

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[1] In the *Meyer* case, the Court noted that the rulers of ancient Sparta "in order to submerge the individual and develop ideal citizens" had "assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians." It noted that Spartan "ideas touching the relation between individual and State were wholly different from those upon which our institutions rest" and that any similar conduct by State authorities would do "violence to both letter and spirit of the Constitution." 262 U.S. at 401-402.

C. A Balancing of the Interests at Stake Shows That the Burden on the Religious Rights of the Amish Parents Substantially Outweighs the Conceivable State Interests.

The major argument made by Wisconsin in answer to the Amish parents' claim that the statutory requirement inhibits the free exercise of religion is that the State, as *parens patriae* for the children of the Amish, may impose conditions which "benefit" the children notwithstanding the parents' objections. But if the State's legitimate interest is subjected to close scrutiny, it becomes clear that it does not approach the gravity and importance of the burdens on the private constitutional right.

1. The Burdens Cast Upon the Amish Parents.

We begin by noting that the Amish parents are affected directly and immediately by the Wisconsin requirement; it commands them, under pain of fine or imprisonment, to perform acts squarely contrary to their religious beliefs—sending their children of high-school age to a formal school. In this respect, their interest in exemption is weightier even than that asserted in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), where the consequences to religious practice were "an indirect result of welfare legislation within the State's general competence to enact." 374 U.S. at 403. The Court there noted that Miss Sherbert's claim was weaker in this regard than if "criminal sanctions directly compel[led] appellant to work a six-day week." *Ibid.* And the same analysis led the Court to reject a Sabbath-observer's challenge to a Sunday Closing Law in *Braunfeld* v. *Brown,* 366 U.S. 599 (1961), on the ground that the law "simply regulates a secular activity and, as applied to appellants, operates so as

to make the practice of their religious belief more expensive." 366 U.S. at 605.

This case involves what *Sherbert* and *Braunfeld* did not—a statute confronting religious believers with "as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecutions." 366 U.S. at 605. And this factor has grave implications for the constitutional issue because it means that if the belief is sincerely held (as is stipulated on this record), the State will never be able to obtain compliance with the command of its law. For while the individual believers in *Sherbert* and *Braunfeld* could conform to the challenged State statutes at some expense or inconvenience, the plaintiffs in this case—forced to choose directly between earthly laws and divine command—have no real option but to follow the latter. Consequently, the rigid enforcement of the State's law—if permitted—simply means that the Amish community will be subjected to repeated criminal sanction or will leave Wisconsin as, it appears from Appendix A to Respondents' Brief in Opposition, they left Arkansas and other States.

A second compelling aspect of the Amish parents' right is the pervasive and lasting nature of the inroad which Wisconsin's enforcement of its statute makes upon their religious life. The expert testimony in the record demonstrates how essential to Amish belief and practice is the religious community's separation from the rest of the world (*e.g.*, App. 109-110, 116, 119, 121). That view is one for which this *amicus* has great understanding. The Biblical command is clear (*Leviticus* xx: 23): "And ye shall not follow the customs of the nations, which I am casting out before you . . . ." And a large part of the Orthodox

Jewish community is distinctive from the world around it by reason of religious restrictions on permissible foods, days of labor, manner of dress and, most importantly, the education of its children.

What Wisconsin asks of its Amish is more than a minor adjustment to modern society. The statute in *Prince* v. *Massachusetts*, 321 U.S. 158 (1944)—which we discuss more fully below—as well as those in *Sherbert* and *Braunfeld* made that kind of small demand on religious believers. Obviously, the future of the religious community was not seriously jeopardized by the administration of an absolute prohibition on child labor or on Sunday sales. Nor would the future of the faith of Seventh Day Adventists have been endangered if South Carolina had been permitted to deny unemployment compensation benefits to those who refused to work on Saturdays for religious reasons.

The only expert who testified regarding the Amish in this record stated that "if the Amish youth are required to attend the value system of the high school as we know it today, the church-community cannot last long, it will be destroyed" (App. 116). Hence the implementation of the State's policy in this case strikes at the heart of the religious faith by undermining its very existence and survival. Such a result should not be permitted unless the danger sought to be avoided is so severe that the State has no choice. We turn now to that question.

2. The Interests of the State.

There is, of course, a strong, valid and permissible State interest in the education of children residing within the State. Wisconsin's brief in this Court relies

almost exclusively on that interest and proceeds on the premise that exemption from its compulsory school-attendance law necessarily gives rise to "the dangers of ignorance" (Pet. Brief, 10-12). In actual fact, the State's interest cannot be framed in terms of these extremes, for the record belies the suggestion that if Amish parents are granted exemption from Wisconsin's law, their children will be "ignorant." The results of a study of Amish children commissioned by the United States Office of Education, which were introduced into the record at respondents' trial (see App. 120), rebut any such claim. The study shows that the achievement level of Amish children who did not attend formal highschools is no lower than that of other children.

Similarly, the record overwhelmingly answers the State's argument that its form of education "assuredly helps to prevent crime. . . ." (Pet. Brief 14). The testimony of the Sheriff and the local director of the Department of Social Services established that, even without the benefit of such education, neither crime nor indigence is found among the Amish (App. 121-122).

And the compulsory education law itself indicates that its command is not intended to be universal. Sections 118.15(3) and 118.15(4) of the law (Pet. Brief 6) permit exceptions from school attendance "for good cause" and substitute instruction if the state superintendent finds it "substantially equivalent." If the State can recognize exemptions for child stage-actors or others who must travel or work during school hours, why should it not also be required to recognize the

exemption claim of those who have a religious reason for refusing to attend?[2]

Ultimately, however, the State's claim comes down to its assertion that its administrators are more qualified and competent to decide what is best for the children of the Amish than their parents. That argument is squarely made at pages 20-21 of Wisconsin's brief, wherein it argues that the State must give the children the "benefit" of formal highschool education notwithstanding the "neglect" of "parental duty" by the adult Amish. This simplistic assertion overlooks the purpose of education, which is to equip children for their adult lives. Assuming, as seems reasonable on this record, that a large majority of Amish children will spend their adult lives within the church-community of their elders, is the State's educative objective realized by forcing upon them concepts and values which serve no purpose in that context and may, in fact, be harmful?

Surely the notion that a State may take over as *parens patriae* to give children an option for ways of life other than those fostered by their parents is contrary to our traditions and may infringe on Fourth Amendment rights of privacy or on the constitutionally penumbral right sustained in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Parents make countless choices

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[2] An additional general indicator of the insubstantiality of the State's interest is the admission by the Public School District Administrator that he instituted the present proceedings substantially in retaliation for the Amish parents' removal of their elementary-school children from the public schools before the census was taken for State revenue purposes. Accordingly, the school district lost "in the vicinity of $18,000" and the administrator "brought the criminal complaint in the present action" (App. 114). Plainly, the harm to the State could not have been too great if it was only on this account that proceedings were begun.

for their children which permanently affect their future lives, and the choice of faith is foremost among them. For the State to intrude into that choice under the guise of offering a "benefit" to the child is to permit it to meddle in the most private and sacred of human affairs.

It is no answer to say—as the dissenting judge did below—that religious liberty may be preserved if the Amish establish a private school consistent with their beliefs (App. 148-151). Such a school, which has apparently been coerced by methods described by the dissenting judge as "gestapo tactics" in States other than Wisconsin, is described by the dissenter as "an Amish vocational school which will teach reading, agriculture, and husbandry, and whatever religious precepts the Amish community desires" (App. 149). If that is the kind of education with which the State will be satisfied, it is all the more proof of the insubstantiality of its interest. For why should the Amish be forced to send their children to a schoolhouse to sit at desks and learn reading, agriculture, husbandry and religion from an instructor who stands at the head of the class when, by the evidence introduced below, all these subjects other than reading are taught in more practical ways in the Amish community in a nonstructured manner—and reading has been taught in the elementary grades. If this is the "benefit" of private education that this case is about, it establishes that the State's only concern is form, not substance, and that it can be satisfied if the Amish are willing to surrender their religious principle to empty formalism and to pour their traditional education into the mold which the State authorities approve.

There is, finally, no substance whatever to the claim that this case is controlled by *Prince* v. *Massachusetts,*

321 U.S. 158 (1944). The Court in *Prince* permitted Massachusetts to prohibit street-preaching by children under its comprehensive child labor law on findings that there was harm to children "arising from * * * activities subject to all the diverse influences of the street" and that "the right to engage in propagandizing the community * * * may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury." 321 U.S. at 169-170. On this basis the Court concluded that while "[p]arents may be free to become martyrs themselves * * * it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Ibid.* In this regard, the Court relied heavily on the State's authority over children in "public activities and in matters of employment." 321 U.S. at 168. Justices Jackson, Roberts and Frankfurter agreed with the result in *Prince* on the ground that the case involved not "religious activities which concern only members of the faith," but a collision with "liberties of others or of the public" in that it related to "money-raising activities on a public scale." 321 U.S. at 177-178.

None of these considerations is present here. Wisconsin cannot claim that exemption from attendance in a formal high school injures the health of a child, makes a "martyr" of him, or endangers society. Nor is the attempt to force Amish parents to establish a private Amish school a form of regulation of the "public activities" or "employment" of children. Rather, the subject of regulation here is "the custody, care

and nurture of the child," which the Court recognized in *Prince* as residing with the parents, "whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166.

CONCLUSION

This case presents a disturbing illustration of an attempt by State authorities to compel nonconformists, whose beliefs and practices are constitutionally protected, to adhere to norms which may be entirely sound and desirable for most inhabitants of this country but which are offensive and harmful to the affected religious minority. Neither the record in this case nor common experience justifies the imposition of these restrictions, which are prompted more by an interest in symmetry than by any reasoned policy. The Constitution and the traditions of this Nation do not permit this kind of coercion, which endangers all religious or ethnic minorities. Accordingly, the decision of the Supreme Court of Wisconsin which rejected the State's effort to impose its will on the Amish parents, should be affirmed.

Respectfully submitted,

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